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No. 94-1540

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTIS CHEEVES & THEODORE GIBSON, *et al.*,
Petitioners,

v.

SOUTHERN CLAYS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is this petition for certiorari barred because petitioners explicitly omitted from their Notice of Appeal the orders concerning recusal of the district judge that they now seek to have reviewed on certiorari?

2. In its summary affirmance, did the Court of Appeals properly reject the petitioners' allegation that the district court was somehow biased against petitioners' counsel and should be recused, where the district court never displayed any appearance of partiality or antagonism against petitioners' counsel during the proceedings in these cases?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Overview

The actions before this Court are two consolidated diversity cases filed in 1986 involving claims that respondents failed to make certain disclosures in connection with purchases of property in 1954 and 1962.* The district court entered summary judgment against petitioners, holding, among other things, that their claims were barred by the applicable four-year Georgia statute of limitations because they were brought more than 20 years after the events in question. This summary judgment was based entirely upon state law. The United States Court of Appeals for the Eleventh Circuit has now issued a summary *per curiam* affirmance of the summary

* In compliance with this Court's Rule 29.1, respondents note that respondent Southern Clays, Inc. no longer exists and, while it existed, had no parent companies or subsidiaries. Respondent The Rhode Island Charities Trust has no parent companies or subsidiaries.

judgment in favor of respondents. Given these circumstances, there is no issue in this case worthy of this Court's consideration on certiorari.

Nevertheless, in attempting to obtain review by this Court, petitioners raise an issue concerning their repeated efforts to recuse the district judge in these cases. This very issue of petitioners' efforts to recuse the district judge has been the focus of two prior petitions for certiorari to this Court, both of which were denied. *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *Watkins v. United States*, 502 U.S. 922 (1991); *see In re Cheeves*, 113 S. Ct. 832 (1992) (denial of mandamus petition). Respondents respectfully submit that the issue of recusal, which has been rejected seven times in the district court, four times by the Eleventh Circuit Court of Appeals, and twice by this Court, does not merit review. *See Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1584 (M.D. Ga. 1992) (describing seven motions); *In re Gibson*, No. 90-8561 (11th Cir. June 25, 1990) (denial of writ of mandamus); *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990) (table case); *Watkins v. United States*, 502 U.S. 922 (1991); *Cheeves v. Southern Clays, Inc.*, No. 86-43-1-MAC (WDO) (M.D. Ga. Oct. 30, 1992); *In re Watkins*, No. 92-8554 (11th Cir. June 26, 1992) (denial of writ of mandamus); *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *Cheeves v. Southern Clays, Inc.*, 39 F.3d 326 (11th Cir. 1994) (summary affirmance), *petition for cert. filed* (U.S. March 16, 1995) (No. 94-1540).

Moreover, the recusal orders that petitioners challenge here were explicitly omitted from petitioners' otherwise highly specific Notice of Appeal. In light of this, respondents alerted the Court of Appeals to its lack of jurisdiction since the recusal orders were not included in a timely Notice of Appeal. The Court of Appeals did not explicitly rule on this point and issued only a summary affirmance. Respondents again point out the jurisdictional defect here, as an additional reason for denying certiorari.

B. Procedural History

The history of petitioners' recusal campaign, as relevant to this petition for certiorari, can be briefly summarized.[1] Petitioners and/or their counsel (Mr. Nix) moved to recuse the district judge—Chief Judge Wilbur D. Owens—seven times, with all of the motions arising out of the same core facts. Five of the motions were filed in the *Cheeves* and *Gibson* cases now before this Court, and two of the motions were filed in a criminal case then pending before Judge Owens. All of the motions arose out of petitioners' allegations concerning a conference that Chief Judge Owens had with another judge in his district, Judge Duross Fitzpatrick, concerning a man named Robert Lee Watkins.

Robert Lee Watkins is a non-lawyer, who was instrumental in causing the *Cheeves* and *Gibson* petitioners to file their claims against respondents. Robert Lee Watkins himself was not and is not a party to these cases. He served as a non-party, self-styled "investigator" and "attorney-in-fact" for petitioners. Mr. Watkins was to receive a contingency fee if petitioners were successful in these cases.

In addition to his involvement in the *Cheeves* and *Gibson* cases, Mr. Watkins was also involved in another similar case against different defendants pending before Judge Fitzpatrick. In that case, Judge Fitzpatrick received evidence indicating to him that Mr. Watkins had suborned perjury in the case by causing a witness to fab-

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[1] The petition for certiorari purports to recount various facts concerning not only the recusal issue but also the merits of the cases. This brief in opposition is not the place to debate petitioners' allegations on the merits. The more important point is that petitioners' allegations on the merits are just that—allegations—not supported by evidence; as a matter of law, respondents did not engage in any fraudulent or unconscionable act, as not only the district court found, but the Georgia Court of Appeals found separately in *Butts v. Southern Clays Inc.*, 450 S.E.2d 244 (Ga. App. 1994).

ricate testimony in a deposition. Because Judge Fitzpatrick was presiding over a case involving Mr. Watkins and because he suspected Mr. Watkins of wrongdoing, Judge Fitzpatrick went to Judge Owens, in his capacity as Chief Judge of the Middle District of Georgia, for Judge Owens' guidance on how Judge Fitzpatrick should handle the case before him. Judge Fitzpatrick and Judge Owens had a conference on the subject.

In the conference between the two judges, Judge Fitzpatrick informed Judge Owens, as Chief Judge of the Middle District of Georgia, of his belief that Mr. Watkins had suborned perjury in a case pending before Judge Fitzpatrick. *See United States v. Watkins*, No. 90-8317 (11th Cir. Dec. 7, 1990), included in the Appendix to this brief at 2a. After the conference, Judge Fitzpatrick stayed the case before him involving Mr. Watkins and referred the incident concerning Mr. Watkins to the United States Attorney in Macon. Mr. Watkins was later indicted and a criminal case was filed against him. The criminal case was assigned to Judge Owens.

In the wake of these events, petitioners began seeking to recuse Judge Owens from the *Cheeves* and *Gibson* cases, claiming that Judge Owens' conference with Judge Fitzpatrick gave rise to a potential for bias or partiality against Mr. Watkins, and thus a potential for bias against petitioners because Mr. Watkins was their attorney-in-fact and investigator. Judge Owens subsequently rejected the first three such motions for recusal in the *Cheeves* and *Gibson* cases, ruling, among other things, that a conference concerning the administration of the court between two judges does not constitute an extrajudicial event, which is the kind of event necessary to support a claim of an appearance of bias or prejudice. *See* 797 F. Supp. at 1577. Petitioners responded to these rulings by seeking mandamus relief in the Eleventh Circuit, which was denied. *In re Gibson*, 90-8561 (11th Cir. June 25, 1990), included in the Appendix to this brief at 1a.

Contemporaneously with these events in the *Cheeves* and *Gibson* cases, related events were occurring in the *Watkins* criminal case pending before Judge Owens. Watkins and his counsel (Mr. Nix, who also served as petitioners' counsel in the *Cheeves* and *Gibson* cases) filed two motions making the same recusal argument made in *Cheeves* and *Gibson*. Judge Owens made similar rulings rejecting them. *See* 797 F. Supp. at 1575-77. Watkins was subsequently tried and convicted by a jury.

Watkins appealed his conviction, as well as the recusal rulings, to the Eleventh Circuit. The Eleventh Circuit expressly rejected the recusal challenge and held that the Judge Owens-Judge Fitzpatrick conference was not grounds for recusal as a matter of law:

> [A]ny information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extrajudicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of [Judge Owens].

3a. After the Eleventh Circuit rejected his appeal, Mr. Watkins petitioned this Court for a writ of certiorari to review the decision of the Eleventh Circuit on the recusal issue. This Court denied certiorari, *Watkins v. United States*, 502 U.S. 922 (1991), rendering the Eleventh Circuit's decision of this issue final.

While the *United States v. Watkins* matter was being pursued through the appellate process, Mr. Nix, acting as counsel for petitioners and Watkins, filed judicial misconduct charges relating to the Judge Owens-Judge Fitzpatrick conference against Judge Owens with the Eleventh Circuit Judicial Council pursuant to 28 U.S.C. § 372(c). In the *Cheeves* and *Gibson* cases, petitioners subsequently filed a fourth motion to recuse Judge Owens on the grounds that Judge Owens must now have become biased against *counsel* because counsel had made so many allega-

tions of wrongdoing against Judge Owens. *See* 797 F. Supp. at 1578. That fourth motion for recusal was also denied.

Petitioners then prepared to file a fifth motion for recusal in the *Cheeves* and *Gibson* cases and sought to take the deposition of Judge Owens and the other two district judges in the Middle District of Georgia. Judge W. Terrell Hodges of the Middle District of Florida was then temporarily assigned by the Eleventh Circuit to decide petitioners' motions to depose the judges. Judge Hodges later ruled that the Judges could not be deposed under the circumstances. *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570 (M.D. Ga. 1992).

While the deposition issue was pending, petitioners filed the referenced fifth motion for recusal. Judge Owens subsequently rejected that fifth motion and stated:

> The Court finds that this fifth motion to recuse has risen to the level of harassment. Nix [petitioner's counsel] has thirty days to show cause in writing why the Court should not impose Rule 11 sanctions.

Pet. App. 6.[2] Following Judge Owens' Order suggesting a Rule 11 violation, Judge Hodges was again temporarily assigned to the Middle District of Georgia to decide the Rule 11 issue.

In the interim, petitioners sought and were denied mandamus relief on the issue of Judge Owens' rejection of the fifth motion for recusal. *In re Watkins*, No. 92-8554 (11th Cir. June 26, 1992), included in the Appendix to this brief at 4a. Following that denial of mandamus by the Eleventh Circuit, petitioners petitioned for writs of certiorari, mandamus and prohibition to this Court, all of which was denied on December 14, 1992. *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *In re Cheeves*, 113 S. Ct. 832 (1992). The rejected petitions for writs of certiorari, mandamus and prohibition

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[2] Citations to "Pet. App." are to the Appendix to the Petition for Certiorari.

alleged that Judge Owens was biased against counsel (Mr. Nix), and quoted from the same judicial misconduct proceedings that plaintiffs quote from in their instant petition for certiorari as grounds for review.

While petitioners' 1992 petitions for certiorari, mandamus and prohibition were pending in this Court, Judge Hodges issued his ruling on the Rule 11 issue, holding that petitioners' counsel had violated Rule 11. A copy of Judge Hodges' opinion is included in the Appendix to this brief at 5a. Judge Hodges fined petitioners' counsel, finding that "no reasonable lawyer . . . would have filed the last two motions [for recusal] after the Court of Appeals decisions." 14a.[3]

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[3] In deciding the Rule 11 issue, Judge Hodges specifically rejected the contention that petitioners' various recusal motions (including those filed in *United States v. Watkins*) were based on different grounds. Judge Hodges stated:

> All of the motions . . . and the orders denying them, shared two common features which [petitioners' counsel] simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the [petitioners'] agent, so that Chief Judge Owens' impartiality toward Watkins and the [petitioners] might reasonably be questioned.

10a. Judge Hodges also found all of the motions were premised on an argument that clearly lacked support under the disqualification statute:

> Secondly, the orders denying the motions—including the unpublished opinion of the Court of Appeals in the criminal case [*United States v. Watkins*]—consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

10a. Judge Hodges imposed sanctions in part because petitioners' counsel urged and re-urged a claim that "was repeatedly and correctly rejected as legally insufficient." 13a.

The recusal campaign came to an end at that point, and the parties renewed their cross motions for summary judgment on the merits, which had been filed in December 1990. By Order dated September 14, 1993, Judge Owens granted respondents' motions, holding, *inter alia*, that the applicable statute of limitations under Georgia law had run on petitioners' claims of nondisclosure in connection with respondents' purchase of kaolin lands from petitioners in 1954 and 1962.

Petitioners appealed Judge Owens' ruling on the merits to the Eleventh Circuit, which issued a summary affirmance of the judgment. *Cheeves v. Southern Clays, Inc.*, 39 F.3d 326 (11th Cir. 1994) (table case). The Eleventh Circuit's decision on the merits followed a state court decision by the Georgia Court of Appeals in a similar case, *Butts v. Southern Clays, Inc.*, 450 S.E.2d 244 (Ga. App. 1994), which established that a seller of real estate has no duty under Georgia law to disclose under the circumstances of these cases. Following the Eleventh Circuit's ruling, petitioners filed the instant petition for certiorari—not trying to demonstrate that the district court's decision on the merits is incorrect or contrary to controlling law—but instead challenging the recusal orders, even though those orders were explicitly omitted from petitioners' Notice of Appeal to the Eleventh Circuit.

In the pending petition for certiorari, petitioners argue that the district judge was biased against petitioners' counsel and should have recused himself on that basis under the appearance of impartiality standard set forth in 28 U.S.C. § 455(a). Petitioners essentially claim that the district court used the wrong standard in considering this issue. However, the record indicates that the district court considered petitioners' recusal motion both under the appearance of impartiality standard and under the standard of whether a virulent bias toward counsel had been shown. Pet. App. 5-6. Petitioners' recusal motion did not satisfy either standard. *Id.* Moreover, petitioners

never challenged the correctness of the standard applied by the district court in their appeal to the Eleventh Circuit. For these and the other reasons set forth below, respondents respectfully request that the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

For the following reasons, respondents submit that the instant petition for certiorari plainly does not meet this Court's criteria for granting certiorari. *See* S. Ct. R. 10.

I. THE CHALLENGED RECUSAL ORDERS WERE NOT PROPERLY APPEALED.

In their Notice of Appeal to the Eleventh Circuit, petitioners specifically listed the orders and judgments appealed from, including the date of each order or judgment and the date of its entry on the docket sheet.[4] In addition, a copy of each order or judgment appealed from was attached to the Notice of Appeal. Petitioners did not list the recusal rulings among the orders or judgments being appealed and did not attach copies of those orders to the Notice of Appeal. Subsequently, after the time to appeal had expired, plaintiffs filed a Civil Appeal Form and attached to that form not only the three orders identified in the Notice of Appeal, but also two recusal orders that were not included in the Notice of Appeal. This

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[4] The Notice of Appeal listed the orders and judgments appealed from as follows:

(i) Order of September 14, 1993, entered on docket September 14, 1993;

(ii) Judgment of September 15, 1993, entered on docket on September 16, 1993, said Judgment being pursuant to the above-referenced Order of September 14, 1993, granting summary judgment in favor of Defendants; and

(iii) Order of December 17, 1993, entered on docket on December 17, 1993, denying Plaintiffs timely filed Motion to Alter, Amend, and Reconsider the above-referenced Order of September 14, 1993.

filing emphasizes that the recusal orders were explicitly omitted from the Notice of Appeal.

As a general rule, when an appellant appeals a final order, the appellant is automatically entitled to raise all prior orders entered in the case. However, when an appellant lists in a notice of appeal specific orders appealed from, rather than simply appealing from the final judgment, only the orders appealed from are subject to appeal. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991) ("[i]f an appellant . . . chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal") (ellipses in original) (citation omitted); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374 (11th Cir.) ("by specifically listing only the non-injunction issues, [appellant] indicated his intent *not* to appeal the injunction"), *cert. denied*, 464 U.S. 893 (1983); *see generally Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990). Likewise, by failing to list the orders denying their motions to recuse in the Notice of Appeal while specifically listing the orders and judgments relating to summary judgment as to which an appeal was taken, petitioners limited their appeal to the summary judgment issues. The recusal issues should therefore be rejected because they are not supported by a timely and proper Notice of Appeal.

II. THE ISSUE ON WHICH PETITIONERS SEEK REVIEW IN THIS COURT WAS NOT PRESENTED TO THE ELEVENTH CIRCUIT.

Petitioners' statement of the issue before this Court is "whether disqualification for *extrajudicially* acquired appearances of partiality for or against *counsel* shall be governed by the general 'impartiality might reasonably be questioned' standard of Section 455(a), by the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) expressly applicable only to *parties*, or by the sundry

other standards . . . inconsistently applied by the Courts of Appeals." Petition at 3-4 (emphasis in Petition). Petitioners did not raise this issue in the Eleventh Circuit, however.

The disqualification issue that petitioners presented to the Eleventh Circuit was simply "whether the presiding District Judge abused his discretion in refusing to disqualify himself under 28 U.S.C. § 455." Brief of Appellant at 1. Petitioners simply asked the Eleventh Circuit to find that Judge Owens' refusal to recuse himself was a "clear error of judgment," principally because of his comments to the Special Committee appointed by Chief Judge Tjoflat to investigate charges of judicial misconduct. Petitioners never argued to the Eleventh Circuit that the district court applied the wrong legal standard in ruling on the recusal motions. They simply argued that the quantum of evidence of impartiality was such that Judge Owens committed a clear error of judgment in failing to recuse himself.

In an effort to seek review by this Court, petitioners have created a new issue regarding the standard governing counsel-based disqualification that was not presented to either court below. This Court, however, does not act as a Court of first resort to decide issues that were not previously presented to the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (*per curiam*). This is another reason to deny the writ.

III. THE DISTRICT COURT'S LEGAL RULING CANNOT BE ASCRIBED TO BIAS OR PARTIALITY BECAUSE IT IS CONSISTENT WITH AND CONTROLLED BY PRECEDENTS HANDED DOWN BY OTHER COURTS, NONE OF WHICH IS CLAIMED TO BE BIASED.

The implication of the petition for certiorari is that petitioners lost these cases on the merits because the district judge was allegedly biased. Yet, these cases turn on two central legal issues that have been dispositively

decided against petitioners by other courts not subject to the charge of bias, specifically, (1) whether there was a duty to disclose under Georgia law in the circumstances of these cases; and (2) whether the statute of limitations ran where plaintiffs exercised no diligence in pursuing the claims at issue. Both of these issues were decided against petitioners by other courts whose impartiality has not been questioned.

First, in *Butts v. Southern Clays, Inc.*, 450 S.E.2d 244 (Ga. App. 1994), *cert. denied* (No. S95C0357) (Ga. Feb. 20, 1995), the plaintiffs, like petitioners, sold property to a kaolin company knowing the land contained the mineral kaolin. *Id.* at 246. Based on an application of Georgia law, the Georgia Court of Appeals affirmed summary judgment for respondent Southern Clays, Inc., stating as follows:

> Under the facts of this case, plaintiffs are unable to meet their burden of establishing that Southern had a duty to disclose *any* information with regard to the kaolin reserves on plaintiffs' property absent an inquiry by plaintiffs. This is not a case where the plaintiffs did not know that their land contained kaolin prior to the sale. Plaintiffs knowingly sold their land for its kaolin content to a company that they knew was in a position to have superior knowledge regarding the quantity and quality of the reserves.

Id. at 247 (emphasis in original). The state court in *Butts*, like the district court here, held summary judgment appropriate because of plaintiffs' inability to demonstrate a duty on which to predicate a claim of actual fraud.[5] The *Butts* decision is a controlling Georgia decision on an issue of Georgia law that totally disposes of petitioners' claims on the merits.

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[5] The decision in *Butts* finding no duty to disclose where a seller knows that he is selling kaolin land to a kaolin company is completely consistent with the decision in *Cheeves* and *Gibson*, and also consistent with the decision in *McLendon v. Georgia Kaolin*

Similarly, the central statute of limitations issue in these cases was decided against petitioners by another court. In *Ennis v. Freeport Kaolin Co.*, No. 85-17-2-MAC (M.D. Ga. June 30, 1987), *aff'd*, 838 F.2d 1220 (11th Cir. 1988) (table case), the Eleventh Circuit affirmed summary judgment on the basis of the statute of limitations where the plaintiffs, like the petitioners here, exercised absolutely no diligence to ascertain the value of their land before selling it. In sum, petitioners lost these cases on the merits, not because the district court was biased, but because their claims were not supported by the law or the undisputed facts.

IV. THERE WAS NO APPEARANCE OF BIAS OR PREJUDICE AGAINST PETITIONERS' COUNSEL, AND THE STANDARDS WHICH THE DISTRICT COURT APPLIED WERE APPROPRIATE AND HAVE NOT BEEN THE SUBJECT OF A DIVISION IN THE CIRCUITS.

The thrust of the petition is that (a) the district court was biased or appeared to be biased against petitioners' counsel; (b) the district court used the wrong standard in deciding the effect of that bias; and (c) the circuits are divided over what standard to use when the alleged bias is against counsel, as opposed to the party itself. Petitioners are wrong on all counts.

The claim that Judge Owens was biased against Mr. Nix is premised on the assertions that (1) Judge Owens must have been biased against counsel because counsel accused Judge Owens of judicial misconduct; (2) Judge

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Co., 782 F. Supp. 1548 (M.D. Ga. 1992). Petitioners claim that Judge Owens' decision in *McLendon* is inconsistent with his decision in *Cheeves* and *Gibson*. However, the pertinent portion of *McLendon* concerns a grant of summary judgment against a plaintiff who knowingly sold kaolin land to a kaolin company. Similarly, here and in *Butts*, the courts granted summary judgment against plaintiffs who knowingly sold kaolin land to a kaolin company. There is no inconsistency. *See Butts*, 450 S.E.2d at 246.

Owens suggested that Mr. Nix be sanctioned under Rule 11 for filing a fifth recusal motion; and (3) Judge Owens testified in the judicial misconduct proceedings that he found his dealings with Mr. Nix to be a chore because Mr. Nix asked too many questions and engaged in repetitive behavior. None of these allegations support the bias charge.

First, the mere fact that a lawyer accuses a court of wrongdoing does not mean the court has to recuse itself. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3542, pp. 577-78 (2d ed. 1984); *see In re Winslow*, 107 B.R. 752, 753 (D. Colo. 1989) ("The filing of a complaint with the Judicial Council is not grounds for disqualification."). Second, Judge Owens' perception of a potential Rule 11 violation in petitioners' *fifth* recusal motion is not antagonism. The crowning evidence on this point is that Judge Owens' suggestion of a Rule 11 violation was found to be meritorious by an independent judge. *See* 5a-15a.

Finally, Judge Owens' assertion that Mr. Nix asks more questions than are necessary and "talks forever" does not show antagonism. At worst, these comments reflect Judge Owens' expression of dissatisfaction with Mr. Nix' behavior and filing of repetitive, prolix motions. Neither such comments nor Judge Owens' ruling denying plaintiffs' motions for recusal are subject to an interpretation of "deep-seated antagonism" under this Court's opinion in *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994):

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display . . . even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

(Emphasis in original.) Petitioners' underlying allegations of bias thus have no basis, and petitioners' entire recusal argument fails as a result.

Not only are the allegations of bias meritless, but petitioners' contentions regarding the standard applied are meritless as well. Petitioners claim that the district court should have used the "appearance of impartiality" standard under 28 U.S.C. § 455(a), instead of examining whether a virulent bias against counsel existed that could be imputed to the party and thereby trigger recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455(b)(1). Petitioners claim that an appearance of partiality can arise sufficient for recusal, even if the partiality is against counsel, and assert that the district court overlooked this possibility.

In addition to the fact that petitioners never raised the issue in the courts below, petitioners are wrong in asserting that the district court failed to apply the "appearance of impartiality" standard. The district court's opinion on the fifth motion for recusal shows that the district court rejected petitioners' motion for recusal under both the "appearance of impartiality" standard and the virulent bias standard. *See* Pet. App. 5-6. ("The test for recusal under both § 455(a) and Canon 3(e)(1) is 'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.' ") (citation omitted) ("In rare circumstances . . . the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Such is not the case here."). Thus, even if the appearance of impartiality standard can be used for bias against counsel (as petitioners contend and respondents do not concede), the district court applied it. Moreover, at no time did bias or the appearance of bias exist which the district court felt it must discount or ignore because the bias was against counsel and not a party.

Finally, petitioners are also wrong in contending that the courts of appeals are divided over the standard for recusal based on bias or prejudice toward a party's counsel. *See* Petition at 16 ("stark differences" among the courts of appeals exist); 19 ("there remains a wide disparity of standards and burdens of proof among the various [courts of appeals] as to counsel-based disqualifications"). An analysis of the caselaw reveals that the circuit split petitioners allege amounts to nothing more than subtle differences in emphasis with respect to a single basic standard.

28 U.S.C. § 144 provides for recusal "[w]henever a *party* to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . . ." (Emphasis added.) Similarly, 28 U.S.C. § 455 (b)(1) provides for recusal if a judicial officer "has a personal bias or prejudice concerning a *party*, or personal knowledge of disputed evidentiary facts concerning the proceeding." (Emphasis added.)

Relying squarely on this statutory language, the courts of appeals have focused on whether bias toward a *party* exists warranting disqualification. *See, e.g., Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991). The circuits uniformly recognize an "exception" to this principle for bias toward counsel strong enough to raise a doubt as to the judge's impartiality toward counsel's client. Although the circuits vary in the language they use to describe this exception, the distinctions that exist are semantic rather than substantive.

The leading decision concerning the issue of recusal based on bias toward counsel in *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *Davis* held that

> an appellate court, in passing on questions of disqualification [based on bias or prejudice against counsel], should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel.

Id. at 1052. This approach is appropriate with respect to analysis under both § 144 and § 455. *Id. Davis* recognizes, however, that the court's controversy with counsel could be an indication of bias toward a party that would require recusal under the statutory standards. For example, "there could be a case where the cause of the controversy with the lawyer would demonstrate bias of such a nature as to amount to a bias against a group of which the party was a member . . ." *Id.* at 1051.

The other courts of appeals that have considered the issue of counsel-based disqualification since *Davis* have followed the same basic approach as *Davis*. For example, the Eighth Circuit noted (in a passage quoted at pages 20-21 of the Petition) that "the cases generally support a theory of imputed bias [*i.e.*, from counsel to the party] only where there are alleged additional facts that suggest that bias against the attorney actually extends to the party." *Souder v. Owens-Corning Fiberglas Corp.*, 939 F.2d 647, 653 n.6 (8th Cir. 1991) (citing *Davis* and decisions of the Fourth and Tenth Circuits).

This approach of focusing on the party in assessing the existence of disqualifying bias while recognizing the possibility that bias toward counsel may in some circumstances be imputed to the party has gained universal acceptance among the courts of appeals. *See In re Cooper*, 821 F.2d 833, 839 (1st Cir. 1987) ("occasionally exceptional circumstances do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client may reasonably be questioned"); *In re IBM Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987)

("[b]ias against an attorney is not enough to require disqualification under § 455 unless petitioners can show that such a controversy would demonstrate a bias against the party itself"); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1412 (5th Cir. 1994); *Davis; Souder*, 939 F.2d at 653 (8th Cir.) ("while mere bias against counsel is not grounds for recusal, under specific circumstances bias against an attorney can reasonably be imputed to a party"); *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985) ("while other courts have suggested that 'bias for or against an attorney can certainly result in bias toward the party,' [citing, *inter alia, Davis*], Judge Real's bias was not so virulent here as to result in material harm to Burt's defense"); *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.) ("bias in favor of or against an attorney can certainly result in bias toward the party"), *cert. denied sub nom. Olson Farms, Inc. v. United States*, 429 U.S. 951 (1976); *Diversified Numismatics*, 949 F.2d at 385 (11th Cir.) ("it is conceivable that a judge could harbor such ill-will toward an attorney that the attorney's clients would also be prejudiced").

Requiring disqualification based on bias against counsel where that bias does not affect the judge's impartiality toward a party would be an unworkable approach. As the court stated in *Davis*,

> Read broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in a controversy with a judge, would have a license under which the judge would serve at their will.

517 F.2d at 1050.

Although petitioners allege "stark differences" among the circuits regarding the issue of counsel-based disqualification, petitioners' allegations do not withstand a review of the relevant case law. The courts of appeals have generally agreed with the *Davis* approach during

the twenty years since *Davis* was rendered. It is therefore not necessary for this Court to step in as the final arbiter of federal law to settle any division among the circuits.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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Dated: April 17, 1995

APPENDIX

APPENDIX

[Filed Jun. 25, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8561

IN RE: THEODORE GIBSON, *et al.*,
Petitioners.

Appeal from the United States District Court
for the Middle District of Georgia

Before FAY, KRAVITCH and CLARK, Circuit Judges.

BY THE COURT:

The petition for writs of mandamus and prohibition is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8317

D.C. Docket No. CR-89-46-MAC(WDO)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROBERT LEE WATKINS,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(December 7, 1990)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

Robert Lee Watkins appeals his conviction of aiding and abetting a witness to testify falsely in violation of 18 U.S.C. §§ 1623 and 2. Appellant claims on appeal that the testimony at issue, although admittedly perjured, was not material. This claim is frivolous.

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appellant also argues that the district judge erred in declining to recuse himself and in declining to refer the recusal decision to another judge pursuant to 28 U.S.C. § 144. After a careful review of the record, we conclude that the district judge did not abuse his discretion.

The letter dated July 11, 1989 conveyed certain information relating to the previous judge's decision to recuse himself. The district judge in this case received that information in his judicial capacity, *i.e.*, as the chief judge of the district with responsibility for reassigning the case. Thus, the district judge acquired that knowledge in his judicial capacity and not in an extra-judicial capacity. Moreover, there is nothing in the letter which indicates bias on the part of the district judge; the letter indicates bias only on the part of the previous judge on account of which he recused himself.

Appellant also asserts that the district judge in this case was biased as a result of conferring with the previous judge. Taking all reasonable inferences favorable to appellant, the context of the alleged conference is as follows: The previous judge, while presiding in a civil case, conferred with his chief judge concerning the appropriate procedure when he suspected that appellant had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case. Thus, any information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of the judge.

The other assertions of bias on the part of the district judge are wholly without merit and warrant no discussion.

AFFIRMED.

[Filed Jun. 26, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8554

IN RE: ROBERT WATKINS, THEODORE GIBSON,
CURTIS CHEEVES, *et al.*,
Petitioners.

On Petition for Writ of Mandamus/Prohibition

Before: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

[Filed Oct. 30, 1992]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Case Nos. 86-43-1-MAC(WDO)

and

86-44-2-MAC(WDO)

CURTIS CHEEVES, *et al.*,
Plaintiffs,

-vs-

SOUTHERN CLAYS, INC., *et al.*,
Defendants.

OPINION AND ORDER

Attorney Franklin R. Nix is counsel of record for the Plaintiffs. During a period of two and a half years he has filed in these cases and in a related criminal case [1] no less than seven separate and successive motions seeking to have Chief Judge Wilbur D. Owens, Jr., disqualified as the presiding judge. All of those motions have been denied.

On another occasion, at a time when no such motion for disqualification was pending, Mr. Nix caused deposition notices and subpoenas *duces tecum* to be served on Chief Judge Owens, as well as the other judges of this district, seeking to orally depose them "with respect to factual matters relevant to Chief Judge Owens' disqualifi-

[1] *United States v. Watkins*, Case No. 89-46 MAC(WDO) Criminal.

cation." I was designated at that time pursuant to 28 U.S.C. § 292(b) by the Chief Judge of the Circuit for the purpose of deciding motions to quash those subpoenas; and, by opinion entered June 17, 1992, I ordered that the subpoenas should be quashed and that depositions of the judges could not be taken. *Cheeves v. Southern Clays, Inc.*, —— F.Supp. —— (M.D. Ga. 1992) (1992 WL 165479). That opinion recited the factual circumstances surrounding each of the various motions for recusal, and there is no need, therefore, to repeat that discussion here.

While those proceedings involving the depositions of the judges were pending before me, Mr. Nix filed his seventh and most recent motion for recusal of Chief Judge Owens.[2] By order entered June 5, 1992, Chief Judge Owens denied that motion and, in the concluding paragraph of the order, stated:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

I was then designated for a second time by the Chief Judge of the Circuit pursuant to 28 U.S.C. § 292(b) to "handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr., to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in [these cases]." Mr. Nix filed a timely written response to the

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[2] The motion, filed April 9, 1992, was in fact the fifth such motion made in these civil cases. The other two motions, bringing the total to seven, were filed in the related criminal proceeding (see note 1, *supra*.) The motion of April 9, 1992 purported to be addressed to me but I declined to consider it on its merits because I was only designated to decide the deposition issue, not the underlying issue of disqualification. *See Cheeves v. Southern Clays, Inc., supra.*

order to show cause and I then scheduled and conducted a hearing in the matter on September 16, 1992.

Three issues are presented. The first, raised during oral argument at the hearing, is whether the court has subject matter jurisdiction under Rule 11 to impose any sanctions in the circumstances of this case. The second issue, assuming jurisdiction exists, is whether Rule 11 has been violated; and the third issue involves the appropriate sanction to be imposed in the event a violation of the rule is found. I have determined that subject matter jurisdiction does exist, i.e., that Rule 11 does apply; that the rule has been violated; and that an appropriate sanction in the form of a fine should be imposed.

I

Mr. Nix points out that the opposing parties have not sought Rule 11 sanctions in the form of attorney's fees or the like; that Chief Judge Owens invoked the rule of his own volition; and that the alleged violation is limited to harassment[3] which, presumably, refers to harassment of the court itself rather than opposing counsel or the opposing litigants since they have made no such claim. From this it is argued that any alleged harassment of the court would necessarily constitute a criminal contempt which can only be dealt with pursuant to Rule 42(b), F.R. Cr. P., or perhaps 18 U.S.C. § 401, and that Rule 11 simply does not apply. Hence, on the present record, Nix argues, the Court is without subject matter jurisdiction to impose any sanction against him.

While it is true that there does not appear to be any reported case just like this one in which a court has in-

[3] Rule 11, F. R. Civ. P., states in pertinent part:

> The signature of an attorney . . . constitutes a certificate by the signer that the . . . motion, or other paper . . . is not interposed for any improper purpose such as to *harass* or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied).

voked Rule 11 *sua sponte* to punish counsel for acts of harassment, and while it may also be true that the same behavior would constitute a criminal contempt subject to prosecution under Criminal Rule 42(b) or 18 U.S.C. § 401, it does not necessarily follow that Rule 11 is thereby rendered inapplicable. There is ample authority for the proposition that Rule 11 can be invoked by the district court on its own motion; the rule, in fact, explicitly provides that the court may act "upon its own initiative." There is also binding precedent in this Circut concerning Rule 11 violations that a monetary sanction as a financial penalty, not measured by costs or attorneys' fees of opposing parties, is not only an available option under the rule, it is often the preferred sanction. In *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) *en banc*, the Court held:

> Imposing a financial penalty often will be the most effective and fair means of enforcing Rule 11 and deterring baseless suits. When imposed upon a lawyer, a financial penalty forces the lawyer rather than the client to bear the costs of violations of the rule. . . . We hold that monetary sanctions serve the purposes of Rule 11 and may be imposed as sanctions for Rule 11 violations in appropriate cases so long as they are imposed with due process.

The Court also held in *Donaldson* that the contempt rule, Rule 42(b), F.R. Cr. P., need not be followed every time a court considers imposing a monetary sanction, and that a violation of Rule 11 is "fundamentally different from an infraction of criminal contempt and therefore warrants different sanction proceedings." *Id.* at 1558. *See also Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209-1210 (11th Cir. 1985) (imposition of fine in disciplinary proceedings distinguished from criminal contempt).

I therefore conclude that Rule 11 can properly be invoked in the circumstances presented by this case, and

the fact that the same circumstances might also be made the basis of contempt or disciplinary proceedings does not alter that result.

II

Concerning the central issue of whether counsel's behavior has amounted to harassment in violation of Rule 11, Mr. Nix first argues that the last motion in these civil cases was not even addressed to Chief Judge Owens for decision but was, instead, addressed to me. This alone demonstrates, he says, that harassment of Chief Judge Owens was not intended and could not have been accomplished. This approach, of course, totally ignores the historical background consisting of all the preceding motions and seeks inappropriately to confine attention to the last motion alone for purposes of the Rule 11 analysis. Clearly, however, in determining whether harassment has occurred it is necessary to examine the totality of the relevant conduct and the pattern of behavior presented. The word "harassment," almost by definition, will rarely apply to a single act; it usually contemplates a series of acts or taunts. In deciding this issue, therefore, the court will take into account the cumulative effect of, and the circumstances surrounding, all of Mr. Nix's motions to disqualify Chief Judge Owens including those filed in the related criminal proceeding.[4]

With regard to the frequency and repetitive nature of the motions, Mr. Nix argues that each one differed in some important respect from its predecessors so that each motion was, in the language of Rule 11, "well grounded in fact and . . . warranted by existing law." He points out, for example, that the second motion in the civil cases (the third overall motion) was predicated upon

[4] Of course, Rule 11 has no effect in the criminal case and cannot be applied with respect to any motions filed in that case. It is appropriate, however, to consider the filing of those motions as a part of the overall pattern of conduct from which the Rule 11 issue arises.

"new evidence,"[5] and that the next motion in the civil cases (the fifth overall motion) was based upon both 28 U.S.C. § 144 and § 455(a), accompanied by affidavits, whereas the earlier motions were submitted on the sole authority of § 455(a) without supporting affidavits.

All of the motions, however, and the orders denying them, shared two common features which Mr. Nix simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the plaintiffs' agent, so that Chief Judge Owens' impartiality toward Watkins and the plaintiffs might reasonably be questioned.[6] Secondly, the orders denying the motions—including the unpublished opinion of the Court of Appeals in the criminal case—consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

There are two separate statutes governing judicial disqualification. The older statute is 28 U.S.C. § 144 which provides:

> Whenever a party to any proceeding in a district makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in

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[5] This "new evidence" is discussed in *Cheeves v. Southern Clays, Inc., supra,* —— F.Supp. at ——.

[6] The subornation of perjury by Watkins was the subject of the separate criminal proceeding referred to in note 1, *supra.*

> favor of any adverse party, such judge shall proceed no further . . .

The newer statute, enacted in 1974, is 28 U.S.C. § 455 (a) and (b) which provides:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party . . .

The interrelationship of Sections 144 and 455 was first considered in this Circuit[7] in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Court held:

> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than a counsel. *The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context.* This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned. (Emphasis supplied).

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[7] The law of the Fifth Circuit as it existed prior to October 1, 1981, is the law of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) *en banc*.

See also, Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Phillips v. Joint Legislative Committee,* 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Meester,* 762 F.2d 867 (11th Cir. 1985), *cert. denied,* 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *Jaffree v. Wallace,* 837 F.2d 1461 (11th Cir. 1988).

Mr. Nix argues that Section 455(a), requiring disqualification whenever a judge's "impartiality might reasonably be questioned," creates a broader basis for recusal than Sections 144 or 455(b)(1) which are restricted to cases of "personal bias," and that under Section 455(a) a disqualification may be required in some cases even when the alleged bias stems from a judicial as distinguished from a personal source. Ordinarily, however, as all of the governing Eleventh Circuit decisions make clear, claims of bias or prejudice under either statute must relate to personal rather than judicial bias; and this remains true under subsection (a) as well as subsection (b) of Section 455. When it is asserted that a judge's "impartialty might reasonably be questioned," it must be shown that the cause stems from extra-judiciai conduct; it is only the exceptional case in which bias from a judicial source may require disqualification:

> An exception to the general rule that the bias must stem from an extra-judicial source exists where 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.' (Citation omitted). *United States v. Meester,* 762 F.2d 867, 885 (11th Cir. 1985).

In this case none of the motions for disqualification ever claimed a "pervasive" bias and prejudice shown by

judicial conduct. Rather, as previously stated, the claim was that Chief Judge Owens' impartiality might reasonably be questioned because of so-called *ex parte* discussions, and one communication by letter, between Chief Judge Owens and Judge Fitzpatrick in a judicial context; and that claim was repeatedly and correctly rejected as legally insufficient.

Moreover, it is important to note that the repetitive motions for disqualification were not just rejected by Chief Judge Owens alone. The latter two motions in these civil cases—one filed September 26, 1991 and one filed April 9, 1992—were both submitted *after* the Court of Appeals had *twice* reviewed the denials of earlier motions, once by rejection of a petition for mandamus and prohibition, *In re Theodore Gibson*, No. 90-8561 (11th Cir., June 25, 1990), *reh'g and suggestion of reh'g en banc denied* (Sept. 18, 1990), and once again on the direct appeal in the criminal case, *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), *cert. denied* —— U. S. ——, 112 S.Ct. 333 (1991). *See also, Cheeves v. Southern Clays, Inc., supra*, —— F.Supp. at ——, n. 10.

In determining the propriety of counsel's conduct under Rule 11, a preliminary question arises as to whether the rule requires a finding of an actual subjective intent to harass, or whether an objective test should be applied, i.e., determining what a reasonable person would have done, or refrained from doing, under the same circumstances. The answer is clear. Under the rule as amended in 1983, the objective standard applies. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) *en banc*.

After reviewing the totality of the circumstances, particularly the filing of seven successive repetitive motions; an apparent failure on the part of counsel to either acknowledge or accept the legal principle consistently applied by the Court in denying those motions, two of

such rulings being made by the Court of Appeals itself; and after applying an objective standard to those circumstances (rather than a subjective or bad faith standard), I have concluded that Rule 11 was violated in this case. No reasonable person—no reasonable lawyer—would have filed the last two motions after the Court of Appeals decisions. Or, stated another way, in the language of Rule 11, from any objective point of view those motions could only have been "interposed for [an] improper purpose, such as to harass."

III

Having decided that Rule 11 applies, and that the rule has been violated, it remains for the court to determine an appropriate sanction. Since no other party has sought an award of fees or costs (and there is no evidence before me to establish the measure or amount of any such award), the imposition of a fine is the appropriate sanction. *Donaldson v. Clark, supra.* In deciding upon the amount of the fine the court has first attempted to survey the Rule 11 sanctions previously imposed in this district and has discovered, interestingly, that *Donaldson v. Clark* happened to arise here and is the only reported decision involving a Rule 11 sanction in the Middle District of Georgia. In that case a fine of $500 was imposed in addition to fees and costs. In general, it has been held that fines should be established in the least amount necessary to deter future misconduct, and the offender's ability to pay is ordinarily one of the factors to be taken into account in making that judgment. See *White v. General Motors Corporation, Inc.*, 908 F.2d 675, 684-685 (10th Cir. 1990) and authorities there cited. In this instance, although notice was given and a hearing was conducted, no evidence was sought or presented concerning Mr. Nix's individual financial status.

I have determined, therefore, that the publication of this opinion together with the assessment of a symbolic

fine in the amount of $500.00 and a reference of the matter to the State Bar of Georgia [8] should be sufficient to meet all of the objectives of Rule 11.

Accordingly, attorney Franklin R. Nix is ordered to pay a fine in the amount of $500.00 to the Clerk of this Court. Such fine shall be paid within twenty (20) days, failing which the Clerk shall enter judgment against him in that amount in favor of the United States. The Clerk is further directed to promptly bring this opinion and order to the attention of the State Bar of Georgia for its consideration as to whether additional disciplinary proceedings may be warranted.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of October, 1992.

/s/ William Terrell Hodges
United States District Judge

[Entered on Docket October 30, 1992]

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[8] The Middle District of Georgia does not presently have a rule of court governing the discipline of members of its bar.